

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA

VS.

BOBBY JAMES NICHOLSON

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NO. A-08-CR-157 LY

**REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The undersigned submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b), 18 U.S.C. § 3401(i), and Rule 1(d) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. The Court conducted a hearing on October 24, 2011, and heard arguments from all of the parties with regard to the U.S. Probation Office's Petition seeking to revoke the Defendant's term of supervised release.

I. PROCEDURAL BACKGROUND

On July 16, 2008, Judge Lee Yeakel sentenced the Defendant to 30 months of imprisonment, followed by three years of supervised release, for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and 12 months imprisonment and one year of supervised release, for assault on a federal officer, in violation of 18 U.S.C. § 111(a), the latter sentence to run concurrent with the former. The Defendant's supervision commenced on February 4, 2011.

On April 7, 2011, the Defendant was arrested by Austin police as a result of what appears to have been a drug deal gone bad. The Defendant drove a friend to purchase a quantity of marijuana, and, at the friend's direction, fled with the friend from the scene of the purchase with the

seller's drugs and other property still in the car, not yet having paid the seller. The seller reported the theft to law enforcement, but contended that he had been kidnaped at an ATM. The Defendant and his associate were arrested and initially charged with aggravated robbery and aggravated kidnaping. Once the actual facts were discovered (the absence of any evidence on the ATM video was apparently telling), the Defendant was charged with theft from a person and sentenced to 100 days in state jail.

While the state case was proceeding, the Probation Office submitted its petition and the undersigned ordered the issuance of a warrant on April 8, 2011. When the Defendant completed his state sentence, he was released to the U.S. Marshal on this warrant.

On October 24, 2011, the Defendant and his attorney appeared before the undersigned Magistrate Judge for a hearing on the Petition. On the same date, the Defendant and his attorney signed a Consent to Allocation Before United States Magistrate Judge. Pursuant to 28 U.S.C. Section 636(a) and 18 U.S.C. § 3401(i), this Court held a Supervised Release Revocation Hearing, at which time the Defendant pleaded "true" to the charges against him.

II. FINDINGS OF THE COURT

1. The Defendant was competent to stand trial on the charges against him, and had both a factual as well as a rational understanding of the proceedings against him.
2. The Defendant does not suffer from any physical or mental impairment that would affect his ability to fully understand the charge against him or the consequences of his plea.
3. The Defendant received a copy of the Petition naming him, and he read it.
4. The Defendant understood the Petition and the charges against him and had the opportunity to discuss the Petition and charges with his attorney.

5. The Defendant waived his preliminary hearing.
6. The Defendant voluntarily gave consent to allocute before a United States Magistrate Judge.
7. The Defendant understood that he had the right to present evidence and to cross-examine witnesses at the hearing, and waived that right.
8. The Government gave a summary of the evidence against the Defendant, to which the Defendant did not object.
9. The plea of true was freely, intelligently, and voluntarily made by the Defendant.
10. The Defendant understood all of his statutory and constitutional rights and desired to waive them.
11. The Defendant violated conditions of his supervised release by: (1) committing a new state law offense.

III. RECOMMENDATIONS

The Court has carefully considered all of the arguments and the evidence presented by the Government and the Defendant and RECOMMENDS, based on the original offense and the intervening conduct of the Defendant, that the Defendant's supervised release be REVOKED. The Court has taken into account the policy statements in Chapter Seven of the Sentencing Guidelines. The most serious violation is a Grade B, and the Defendant's criminal history category is V, resulting in an (advisory) guideline range of 18 to 24 months of imprisonment on Count One and 12 months on Count Two. The Court has considered all of the above, and RECOMMENDS that the Defendant be sentenced to 18 months of imprisonment on Count One, and 12 months of imprisonment on

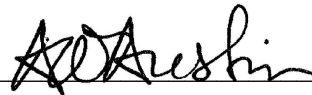
Count Two, to run concurrent with the sentence on Count One. No additional supervised release is recommended.

IV. OBJECTIONS

In writing following the Court stating on the record its recommendation in this case, the parties waived the fourteen day period in which they may file of objections to this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglas v. United Services' Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*). Accordingly, there will be no objections to this Report and Recommendation, and the matter is ripe for the District Court to act upon it.

To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 25th day of October, 2011.

A handwritten signature in black ink, appearing to read "A. Austin", is written over a horizontal line.

ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE